IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF RODNEY GLENN, Plaintiff, v. BOROUGH OF MORRISVILLE, VICTOR CICERO, THOMAS HERRON, ROSS DALESSIO, WAYNE APICE, JAMES DEGOUR and OFFICER JONES, Defendants.	: : : : : : : :	CIVIL ACTION NO. 99-1941

Memorandum and Order

YOHN, J. July , 2000

A robbery was reported and, following a chase and a struggle, the suspect was apprehended. He was taken to the holding cell for the Borough of Morrisville Police Department. Once in the cell, his handcuffs were removed. His shoes and belt were taken from him, too, and put against the base of the wall opposite the cell entrance. As one officer questioned the suspect, another attended to administrative matters. At some point, the questioning officer left. The holding cell was inspected once without incident. At the next inspection of the cell, the suspect was found hanging by his belt. He was taken down immediately, and emergency care was provided. Tragically, he died. His mother, on behalf of his estate, brought this action against the Borough of Morrisville and several officers in their individual capacities. All defendants have moved for summary judgment on all claims. I will grant the motions as to all defendants but one.

BACKGROUND

On May 29, 1997, a robbery was reported over the police radio. *See* Borough of Morrisville Defs.' Concise Statement of Undisputed Facts ¶¶ 1-2 & 5 (Doc. No. 18) [hereafter "Borough Statement"].[1] A fleeing suspect was identified, and chase was given by a number of officers, including Lieutenant Thomas Herron ("Herron") and Officer Wayne Apice ("Apice"), each of the Borough of Morrisville Police Department ("Borough" or "Morrisville"), and Officers DeGour ("DeGour") and Jones ("Jones") of the Falls Township Police Department. *See id.* ¶¶ 6-9; Mem. in Supp. DeGour & Jones Mot. Summ. J. Ex. A at 18-25 (testimony of DeGour) (Doc. No. 22) [hereafter "Twp. Mot. Br."]; Twp. Mot. Br. Ex. B at 8-10 (testimony of Jones). The suspect, Rodney Glenn ("Glenn"), was tackled by a civilian, enabling Apice and Herron to catch him. *See id.* ¶ 8. Glenn resisted arrest but was subdued by Apice and Herron. *See id.* ¶ 8. Once under control, Glenn was handcuffed and transported to the holding cell at the Borough Police Department. *See id.* ¶¶ 9-10.

Officers Apice and DeGour led Glenn into the holding cell, and removed his handcuffs. *See* Borough of Morrisville Defs.' Br. in Supp. of Mot. for Summ. J. Ex. B at 50-52 & 55 (Apice Dep.) (Doc. No. 17) [hereafter "Borough Mot. Br."]; *id.* Ex. D at 35-36 (DeGour Dep.). Jones was present but did not assist. *See* Twp. Mot. Br. Ex. B at 15. Apice removed Glenn's shoes and

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[1] Pursuant to this court's Scheduling Order of June 23, 1999, a party moving for summary judgment is required to submit a Concise Statement of Undisputed Facts with citations to the record. *See* Sched. Ord. ¶ 7 (Doc. No. 10). The non-moving party must respond in kind. All uncontroverted statements are deemed admitted for purposes of considering the motion. In this case, each defendant filed a statement of undisputed facts, and plaintiff did not contest them. Thus, they are deemed admitted.

belt and placed them on the floor against the hallway wall, approximately four feet away from the front of the holding cell. *See* Borough Statement ¶¶ 11 & 13; Borough Mot. Br. Ex. B at 54-55. Glenn was secured in the cell. Apice then attended to administrative matters, while DeGour spoke with Glenn. *See* Borough Mot. Br. Ex. B at 67-69. Apice returned to assist DeGour and then left the room to determine whether Glenn had a criminal history and to attend to other duties. *See id*. Ex. B at 74 & 77-78. At some point, DeGour left the building. *See id.* Ex. B at 78-79. Apice checked on Glenn at 9:45 a.m., and found nothing unusual. *See* Borough Statement ¶ 15. Apice then became busy handling matters at the front window. *See id.* ¶¶ 16-17. Shortly after 10:00 a.m., Apice asked Borough Officer Ross Dalessio ("Dalessio") to check on Glenn. *See id.* ¶ 17.

About 10:05 a.m., Dalessio checked the cell and found that Glenn had hanged himself with his belt. *See* Borough Statement ¶ 18. He requested assistance, opened the cell door, and cut the belt so that he could take Glenn down. *See id.* ¶¶ 19-20. Apice immediately called for help. *See id.* ¶¶ 19, 21. At 11:11 a.m., Glenn was pronounced dead. *See id.* ¶ 22. An autopsy was conducted which identified the cause of death as asphyxiation caused by suicidal hanging. *See* Borough Statement ¶ 23; Borough Mot. Br. Ex. F. The report also revealed that Glenn had a cut above his right eye, some blood in his nasal passages, and "hesitation marks" on his wrists indicative of past attempts at suicide. *See* Borough Mot. Br. Ex. F.

Jessie Glenn, as administratix of Glenn's estate, brought this action against the Borough as well as Borough employees Chief Victor Cicero ("Cicero"), Herron, Dalessio and Apice. Also named as defendants are Falls Township Officers DeGour and Jones. Before the court are two motions for summary judgment, that of the Borough, Cicero, Herron, Apice and Dalessio, and

that of Officers DeGour and Jones. Plaintiff responded to each, discovery has concluded,[2] and the matters are ripe for disposition.

STANDARD OF REVIEW

Either party to a lawsuit may file a motion for summary judgment, and it will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmoving party bears the burden of persuasion at trial, the moving party may meet its initial burden and shift the burden of production to the nonmoving party "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Thus, summary judgment will be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

When a court evaluates a motion for summary judgment, "[t]he evidence of the nonmoving party is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

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[2] On March 21, 2000, plaintiff responded to the motion for summary judgment by the Borough. On March 29, plaintiff responded to the motion for summary judgment of DeGour and Jones. On March 9, 2000, the court granted plaintiff an extension of time to complete discovery. That extension ended on April 1, 2000. Plaintiff has not submitted additional evidence in support of her claims. Therefore, the record is presumed complete.

Additionally, "all justifiable inferences are to be drawn in [the nonmoving party's] favor." *Id.* At the same time, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmoving party must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

I. CLAIMS UNDERLYING PLAINTIFF'S ACTION

Plaintiff's action alleges deprivations of federal rights under color of state law, presenting claims pursuant to 42 U.S.C. § 1983.[3] Of course, § 1983 is not a source of rights but rather permits a cause of action for the violation of other federal rights. *See Graham v. Connor*, 490

[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See 42 U.S.C. § 1983.

U.S. 386, 393-94 (1989); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir. 1997). Essentially, plaintiff's complaint seeks to hold liable the individual officers for use of excessive force and for reckless indifference to a detainee's risk of suicide, *see* Compl. ¶¶ 14 & 24, while also seeking to hold liable the Borough for failure to train its officers regarding use of force and prevention of suicides, *see id.* ¶¶ 25-26.[4] All theories were brought under § 1983. Defendants responded by moving for summary judgment, arguing that they were entitled to judgment as a matter of law because plaintiff failed to produce evidence in support of any claim under § 1983. *See* Borough of Morrisville Defs. Mot. for Summ. J. ¶ 9 (Doc. No. 17); Borough Mot. Br. at 7-8, 12 & 15; Falls Twp. Defs. Mot. for Summ. J. ¶ 7(b) (Doc. No. 22); Twp. Mot. Br. at 3-5. Although the complaint is in two counts, one against the individuals and one against the Borough, I will analyze the action in terms of constitutional rights asserted, noting different standards of liability where appropriate.

[4] Although a careful reading of the complaint may suggest other possible claims, I treat these as the only claims presented for two reasons. First, notice pleading requires that a party be given "fair notice" of the claims against them. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 48 (1957). Here, defendants thought the action limited to those identified, and plaintiff did not disabuse them of the understanding. Nor was defendants' understanding unreasonable, because the counts of the complaint are distinguished by defendant and not by claim. Second, defendants did not request partial summary judgment. Rather, each sought entry of summary judgment as to all claims brought by plaintiff. *See* Borough Mot. Summ. J. ¶ 9 (Doc. No. 17); Twp. Mot. Summ. J. ¶ 7 (Doc. No. 22). Defendants further pointed out that plaintiff lacked evidence to support any claim under § 1983. *See* Borough Mot. Br. at 8, 9, 12, 13, 15; Twp. Mot. Br. at 3-6. If plaintiff intended to pursue a claim not noticed, it had the opportunity to so advise the court and defendants. It has now passed.

II. USE OF EXCESSIVE FORCE

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *See Graham v. Connor*, 490 U.S. 386, 394 (1989). Neither party addresses the constitutional source of this claim or the question of what legal standard to apply.[5] I do not answer the question, however, because under any standard, plaintiff must identify at least the force used and the circumstances surrounding its use.[6] Plaintiff has not done this.

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[5] The only legal authority cited by either party is the Fourth Amendment case of *Sharrar v. Felsing*, 128 F.3d 810 (3d Cir. 1997), cited by plaintiff concerning the extent of physical injury to be proved. *See* Pl. Resp. at 9.

[6] Claims arising out of the use of force during "an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *See Graham*, 490 U.S. at 395; *Sharrar v. Felsing*, 128 F.3d 810, 821 (3d Cir. 1997). The Fourth Amendment inquiry asks "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances . . . of each particular case." *See Graham*, 490 U.S. at 396-97.

Claims arising out of the use of force against convicted, sentenced and incarcerated persons are controlled by the Eighth Amendment, which requires a determination whether any injury caused was "sufficiently serious" and whether officials "were motivated by a desire to inflict unnecessary and wanton pain." *See Fuentes v. Wagner*, 206 F.3d 335, 344-45 (3d Cir. 2000) (citing *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)). The Third Circuit held recently that "the Eighth Amendment cruel and unusual punishments standards . . . apply to a pretrial detainees excessive force claim arising in the context of a prison disturbance." *See Fuentes*, 206 F.3d at 347.

Claims arising out of the use of force against a person already arrested but not yet convicted and sentenced fall within a legal gray zone. *See Graham*, 490 U.S. at 395 n.10; *United States v. Johnstone*, 107 F.3d 200, 205 (3d Cir. 1997). "It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *See Graham*, 490 U.S. at 395 n.10 (citing *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979)). Whether actions are punishment "depends on whether they are rationally related to a legitimate non-punitive government purpose and whether they appear excessive in relation to that purpose." *See Bell*, 441 U.S. at 561.

Finally, the substantive component of the Due Process Clause of the Fourteenth

Plaintiff's complaint avers both use of excessive force in arrest and use of excessive force in custody. *See* Compl. ¶¶ 13-14. Defendants argue that there is a complete absence of evidence in the record regarding the use of excessive force by any officer. *See* Borough Mot. Br. at 7; Twp. Mot. Br. at 3. Plaintiff concedes a lack of direct evidence of the use of excessive force, but contends that the combined effect of the arrest, inconsistent accounts of medical treatment, and Glenn's death permit an inference "that excessive force was used against [Glenn] and the Defendants are attempting to cover it up." *See* Mem. Supp. Pl. Ans. to Mot. Summ. J. of Borough of Morrisville et al. at 5 (Doc. No. 30) [hereafter Pl. 1st Resp."].[7]

Amendment protects persons from police conduct which "shocks the conscience." *See Fuentes*, 206 F.3d at 348 (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)). The applicability of this standard, however, appears limited to situations where "the police officer must instantaneously respond to a situation without opportunity for reflection." *See Fuentes*, 206 F.3d at 348. The Third Circuit held recently that "the 'shocks the conscience' standard is not inappropriate to an excessive force claim in the context of a prison disturbance." *See id*.

It is clear that each standard requires consideration of the force used and the circumstances in which it was used. Because plaintiff produces no evidence in either regard, I need not resolve the complicated legal question of what standard controls the use of force on a recently arrested, sole occupant of a municipal holding cell.

[7] The conspiracy allegation is premised on suggested inconsistencies in the reports of the emergency medical technicians who treated Glenn, the robbery victim's account of events, and hospital records. *See* Pl. 1st Resp. at 4-9. First, a conspiracy to violate constitutional rights requires proof of the underlying rights violation. *See Estate of Henderson v. City of Philadelphia*, No. 98-3861, 1999 U.S. Dist. Lexis 10367, at *47 (E.D. Pa. July 12, 1999). Plaintiff attempts to do the reverse, using evidence of a conspiracy to prove a rights violation. That is not permissible. Second, plaintiff explicitly excludes the medical examiner and the conduct of the autopsy from any allegation of impropriety. *See* Borough Mot. Br. Ex. I at 33-34. Because that leaves uncontested the medical evidence that Glenn committed suicide, the alleged conspiracy permits no inference of use of excessive force.

A. Count I: Liability of the Individual Officers

In support of a § 1983 claim, plaintiff must prove that a person acting under color of state law violated plaintiff's federal rights. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998). It is undisputed that all defendants are state actors. To demonstrate that an individual state actor is liable for a violation of constitutional rights, plaintiff must show that the defendant was personally involved in the violation. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997).

Plaintiff notes that, in the course of arresting Glenn, Apice struck Glenn once and that Glenn complained of being unable to breathe. *See* Pl. 1st Resp. at 7 (citing *id.* Ex. L at 1 (report of Herron)). First, plaintiff does not rely on that use of force to support this claim. Rather, plaintiff offers the evidence to introduce a discussion of inconsistencies in the records regarding emergency care provided to Glenn. *See id.* No evidence related to Glenn's arrest changes the essential nature of plaintiff's claim: that in light of Glenn's death and evidence that "a cover up of something has occurred," use of excessive force is a permissible inference. *See* Pl. 1st. Resp. at 5. Second, even if plaintiff is claiming that the force identified was excessive, no evidence has been produced in support of that claim. Because the identified force was used during arrest, the claim would be controlled by the Fourth Amendment, which requires that use of force be objectively reasonable. *See supra*, note 6. The analysis "'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *See Sharrar*, 128 F.3d at 821

(quoting *Graham*, 490 U.S. at 396). The report on which plaintiff relies reveals that Glenn was suspected of robbery, fled from officers, struggled with a civilian, threatened the civilian with a large slate stone, and then physically struggled with Apice as he attempted to take Glenn into custody. *See* Pl. 1st Resp. Ex. L at 1; *see also* Borough Mot. Br. Ex. B at 34-37. None of the surrounding facts or circumstances are disputed. The uncontroverted evidence does not permit a conclusion that the alleged use of force was objectively unreasonable.

Regarding plaintiff's claim that excessive force was used while Glenn was in custody, plaintiff has presented no evidence that any force was used, and no evidence bearing on the circumstances surrounding any use of force. Nor is there evidence that any force used was unreasonable, punitive, malicious or shocking to the conscience.

In essence, plaintiff attempts to use the fact of Glenn's death as proof that it was unlawfully caused. *See* Pl. 1st Resp. at 4-9 & 5. Such an inference is not reasonable in light of the uncontroverted autopsy report concluding that plaintiff caused his own death by hanging himself. *See* Borough Mot. Br. at 7 & Ex. F. Despite an awareness of how to impeach the medical evidence, plaintiff has produced no evidence doing so. *See* Borough Mot. Br. Ex. I at 30-31 & 48 (Jessie Glenn questioning EKG, throat injuries, the article used, and the height from which Glenn was found hanging). In fact, after reviewing the record, plaintiff's medical expert agreed that Glenn's death was caused by "passive hanging" or "suicide." *See* Pl. 1st Resp. Ex. J at 2 (Report of Wayne Ross, M.D.). Moreover, the mere fact that a person was injured in police custody is not sufficient to survive a motion for summary judgment on a claim for use of excessive force. *See Sharrar*, 128 F.3d at 821 (finding "no evidentiary basis" for liability where even if injury was sustained, plaintiff could not "identify which police officers were in the police

car with him at the time of the alleged abuse"). *See also Freedman v. City of Allentown*, 853 F.2d 1111, 1114 (3d Cir. 1988) (admonishing courts not to infer a constitutional violation from the fact of suicide).

In sum, plaintiff has failed to meet his obligation to demonstrate that a genuine issue of material fact exists as to whether any officer used excessive force against him. Therefore, I will grant the motion for summary judgment on the excessive force claim as to Apice, Dalessio, DeGour and Jones.

Of course, Herron and Cicero each occupied a supervisory relationship with the other officers. *See* Compl. ¶¶ 6-7. Because there is no respondeat superior liability in a § 1983 action, the fact of their status alone will not subject them to liability. *See Monell v. Department of Soc. Svcs.*, 436 U.S. 658, 691 (1978); *Blanche Road Corp. v. Bensalem Twp.*, 57 F.3d 253, 263 (3d Cir. 1995). Rather, in the absence of evidence of personal participation in a rights violation, a supervisor may be liable for the conduct of his subordinates if he directed or approved, by knowing and acquiescing in, a violation of plaintiff's rights by his subordinates. *See Monell*, 436 U.S. at 691; *Blanche Road Corp.*, 57 F.3d at 263; *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995). Here, however, there is no evidence that excessive force was used. A supervisor may not be liable personally under § 1983 for conduct of his employees which did not violate a person's federal rights. *See Blanche Road Corp.*, 57 F.3d at 263. Moreover, even if excessive force was used, there is no evidence which demonstrates that either Herron or Cicero directed or approved its use. *See Sharrar*, 128 F.3d at 821.

Because plaintiff has failed to produce evidence creating a genuine issue of material fact regarding the use of excessive force, all individual defendants are entitled to judgment as a

matter of law on plaintiff's claim for use of excessive force.

B. Count II: Liability of the Borough for Failure to Train Regarding Use of Force

"[A] municipality is subject to direct liability only where 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'" *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993) (quoting *Monell*, 436 U.S. at 694). Plaintiff does not argue that execution of an affirmative policy caused a violation of Glenn's rights. Rather, plaintiff argues that the Borough failed to train its officers in the proper use of force, thus causing a violation of Glenn's rights.

A municipality may be liable for failure to train its employees "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact" and the municipality has made a deliberate or conscious choice to fail to provide adequate training. *See City of Canton v. Harris*, 489 U.S. 378, 388-89 (1985); *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 (3d Cir. 1997). The inquiry is an objective one and requires plaintiff to show that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *See City of Canton*, 489 U.S. at 390; *see also Farmer v. Brennan*, 511 U.S. 825, 840-41 (1994) (describing *City of Canton* analysis).

Plaintiff has failed to provide any evidence to support a finding of municipal liability on

this claim. First, plaintiff has not produced evidence that any officer used excessive force, relying only on an inference from an alleged cover-up. Second, plaintiff has failed to present any evidence that the Borough's policymakers should have been aware of an obvious need for different training. That is, plaintiff presented no evidence that rights violations were likely. Third, plaintiff has failed to provide any evidence that any Borough policy is constitutionally inadequate regarding proper use of force. When defendants pointed to the absence of evidence in support of plaintiff's claim for use of excessive force, plaintiff was obligated to produce evidence from which a reasonable finder of fact could determine that the defendants were recklessly indifferent to the use of excessive force. Plaintiff has not done this. Therefore, I will grant the Borough's motion for summary judgment on the claim for use of excessive force.

III. RECKLESS INDIFFERENCE TO A DETAINEE'S PARTICULAR VULNERABILITY TO SUICIDE

On this motion for summary judgment, the parties agree that the claim is "a prison suicide claim." *See* Borough Mot. Br. at 8; Pl. 1st Resp. at 10; Twp. Mot. Br. at 5; Mem. in Supp. of Pl. Ans. to Summ. J. Mot. of Defs. DeGour & Jones at 8 (Doc. No. 31) [hereafter "Pl. 2d Resp."]. Defendant analyzes plaintiff's claims under the standard articulated in *Colburn v. Upper Darby Township*, 946 F.2d 1017 (3d Cir. 1991) [hereafter "*Colburn II*"]. *See* Borough Mot. Br. at 8-9; Twp. Mot. Br. at 6. Plaintiff responds by attempting to meet the standard. *See* Pl. 1st Resp. at 10-12; Pl. 2d Resp. at 8-10.

In the Third Circuit, an action premised on "the suicide of a pretrial detainee" is cognizable under § 1983. *See Colburn II*, 946 F.2d at 1023. The protections derive from the

substantive due process component of the Fourteenth Amendment, and are informed by the protections of the Eighth Amendment. *See Colburn II*, 946 F.2d at 1023. In order to prevail in such an action, a plaintiff must prove: "(1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability." *See Colburn II*, 946 F.2d at 1023. A few words about each requirement are in order.

In *Colburn II*, the court explained that a proof of a particular vulnerability to suicide requires "a strong likelihood, rather than a mere possibility, that self-inflicted harm will occur." *See Colburn II*, 946 F.2d at 1024. In turn, to show a strong likelihood of suicide, "the risk of self-inflicted injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges." *See id.* at 1025. As to the second requirement, "'should have known' . . . is a phrase of art with a meaning distinct from its usual meaning in the context of the law of torts." *See id.* "It connotes something more than a negligent failure to appreciate the risk of suicide presented by a particular detainee, though something less than subjective appreciation of that risk." *See id.* Finally, regarding the requirement of "reckless indifference," the Third Circuit derived the "reckless indifference" language from Eighth Amendment cases governing medical care for prisoners. *See id.* at 1023 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) as the first in a line "of cases that provided the theoretical underpinnings" for the standard). The court declined to provide a precise definition of the term, holding only that "a level of culpability higher than a negligent failure to protect from self-inflicted harm is required." *See Colburn II*, 946 F.2d at 1024. The court was clear, however, that subjective awareness of the risk was not required. *See id.* at 1025.

Nonetheless, defendants argue that a showing of "reckless indifference" requires a showing that an officer was subjectively aware of the particular vulnerability. *See* Borough Mot. Br. at 9. Because the argument is well-founded[8] and because plaintiff does not contest the proposition, for purposes of this motion plaintiff must produce evidence that an officer was subjectively aware of a strong likelihood of suicide in order to show a genuine issue of material fact as to the officer's reckless indifference.

A. Count I: Liability of the Individual Officers

Defendants argue that "Plaintiff has failed to present any evidence demonstrating that any of the individual officers are liable under § 1983 since the record fails to establish a necessary

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[8] Defendants' argument is based on the Supreme Court's holding in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), where, confronted with the need to "define the term 'deliberate indifference'" as related to a prison official's liability under the Eighth Amendment, the Court did so "by requiring a showing that the official was subjectively aware of the risk." *See id.* at 828-29. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *See id.* at 837. Because the Eighth Amendment standard informed the Third Circuit's adoption of the "deliberate indifference" or "reckless indifference," *Farmer* may have clarified the ambiguity surrounding the term. *Cf. Farmer v. Brennan*, 511 U.S. at 832 (noting that some circuits required a "subjective standard of recklessness" to show "deliberate indifference" while the Third Circuit applied an objective standard of recklessness in the same context); *cf. also id.* at 836 (equating deliberate indifference to reckless disregard). Therefore, defendants' argument is plausible. Moreover, district courts in this circuit have applied a subjective test in such cases. *See, e.g.*, *Giandonato v. Montgomery County*, No. 97-0419, 1998 WL 314694, *3 (E.D. Pa. May 22, 1998) (concluding that a subjective awareness of risk was required); *Owens v. City of Philadelphia*, 6 F. Supp. 2d 373, 379-80 (E.D. Pa. 1998) (discussing without adopting); *Litz v. City of Allentown*, 896 F. Supp. 1401, 1410 (E.D. Pa. 1995). Finally, in *Fuentes v. Wagner*, 206 F.3d 355 (3d Cir. 2000), the Third Circuit adopted the Eighth Amendment standard for excessive force in the context of a pretrial detainees rights in the midst of a prison disturbance. *See id.* at 347. Without concluding that it is the proper test as a matter of law, I will apply it in this action unless otherwise explained.

element for a prisoner suicide claim." *See* Borough's Mot. Br. at 8; *see also* Twp. Mot. Br. at 6 ("[T]here is absolutely no evidence or testimony to support Plaintiff's § 1983 claim."). Plaintiff's claim will be considered as to each individual officer.

1. Borough of Morrisville Officer Wayne Apice

Plaintiff argues that evidence has been produced which permits an inference that Apice was aware of the risk of Glenn's suicide and was recklessly indifferent thereto. *See* Pl. 1st Resp. at 10-12. I agree.

As explained earlier, there is evidence that Apice took Glenn into the holding cell, removed his handcuffs, removed his shoes and belt, and placed those items outside Glenn's cell. *See supra*, Background. Plaintiff has produced evidence that Glenn was particularly vulnerable to suicide. *See* Pl. 1st Resp. at 10 (citing *id*. Ex. E (documenting depression and previous suicide attempt)). The record also contains evidence that Glenn's prior suicide attempt left visible scars, or "hesitation marks," on his wrists. *See* Pl. 1st Resp. Ex. E; Borough Mot. Br. Ex. F (autopsy report). Plaintiff has produced evidence that in removing handcuffs, an officer might notice hesitation marks on a detainee's wrists. *See* Pl. 1st Resp. Ex. G at 28-29; *id.* Ex. N. at 3. There is record evidence that it was not Apice's custom to remove a detainee's shoes and belt. *See* Pl. 1st Resp. Ex. G at 26-27; *id.* Ex. A at 3. That evidence is supplemented by evidence that there was no departmental policy regarding removal of a detainee's clothing. *See* Pl. 1st Resp. Ex. F; *id.* Ex. G at 70. Finally, there is evidence that suggests that officers would remove shoes and a belt from a detainee if they recognize that the detainee presents a suicide risk. *See* Pl. 1st Resp.

Ex. A at 3; *id.* Ex. G at 27; *id.* Ex. N at 3. Viewed in the light most favorable to plaintiff, the evidence permits the reasonable inference that Apice exercised his discretion to remove the articles because he knew that Glenn was particularly vulnerable to suicide.

Moreover, whether Apice's decision to place the clothing four feet from the cell "evidences an absence of any concern for the welfare of his or her charges" is related to the extent of Apice's knowledge and his decision-making process. In this respect, I observe that officers sometimes placed clothing in other locations. *See* Pl. 1st Resp. Ex. G at 69-70. Also, I note that Apice himself identified other places where he could have put the clothing. *See* Borough Mot. Br. Ex. B at 63. Such evidence permits the inference that Apice chose one place over another out of an absence of concern for Glenn.[9] Because plaintiff has provided evidence that Apice was recklessly indifferent to Glenn's particular vulnerability to suicide, I cannot say that his conduct was constitutional as a matter of law.

Apice then argues that he is entitled to qualified immunity even if he caused a deprivation of Glenn's constitutional rights. "Government officials performing discretionary functions are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *See Sharrar*, 128 F.3d at 826 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

First, it must be determined whether plaintiff has alleged a violation of a clearly

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[9] Of course, none of the evidence identified compels the inferences drawn. It may be true that Apice acted cognizant only of a "mere possibility" that Glenn would harm himself. It may be true, too, that Apice did not recognize the risk to Glenn of placing the clothing in one place rather than another. *See, e.g.*, Borough Mot. Br. Ex. B at 62-63; Pl. 1st Resp. Ex. G at 67-68. It is possible also that Apice was negligent at most, as suggested by his superiors. *See* Pl. 1st Resp. Ex. A at 3. But that is the point: a genuine issue of material fact exists.

established constitutional right. *See Sharrar*, 128 F.3d at 826 (citing *Siegert v. Giley*, 500 U.S. 226, 232 (1991)). "[T]here does not have to be 'precise factual correspondence' between the case at issue and a previous case in order for a right to be 'clearly established,' and we would not be 'faithful to the purposes of immunity by permitting . . . officials one liability-free violation of a constitutional or statutory requirement.'" *See Burns v. County of Cambria*, 971 F.2d 1015, 1024 (3d Cir. 1992) (quoting *People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 144-45 (3d Cir. 1984)). By late 1991, the Third Circuit had five times applied the reckless indifference standard to constitutional claims on behalf of suicidal pretrial detainees. *See Simmons v. City of Philadelphia*, 947 F.2d 1042, 1067-76 (3d Cir. 1991) (considering municipal liability); *Colburn II*, 946 F.2d at 1023-25 (articulating source of right and three-factor test for reckless indifference); *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 669 (3d Cir. 1988) (same); *Williams v. Borough of West Chester*, 891 F.2d 458, 461 (3d Cir. 1989) (applying "deliberate indifference" standard); *Freedman v. City of Allentown*, 853 F.2d at 1114 (applying "reckless disregard" standard). "Given the amount of appellate development of the applicable legal principles, and the specificity of the context in which these principles have been applied, it is evident that the constitutional protection of pretrial detainees from official indifference to known suicidal tendencies was clearly established" by 1997. *See Owens v. City of Philadelphia*, 6 F. Supp. 2d 373, 384 (E.D. Pa. 1998).

Second, the court must determine "whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officers possession." *See Sharrar*, 128 F.3d at 826 (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). "The reasonableness of the officer's beliefs or actions is not a jury question." *See*

Sharrar, 128 F.3d at 828. "Only if the historical facts material to the [objective reasonableness of the officer's actions] are in dispute . . . will there be an issue for the jury." *See id.* Here, questions of fact remain as to what information Apice possessed. In such cases, the Third Circuit has held that summary judgment on grounds of qualified immunity is inappropriate. *See, e.g.*, *Karnes v. Skrutski*, 62 F.3d 485, 496-97 (3d Cir. 1995) (noting that what officers knew was subject to dispute); *Lippay v. Christos*, 996 F.2d 1490, 1504 (3d Cir. 1993) (holding that where liability depended on proof that defendant submitted an affidavit with statements known to be false or with reckless indifference to their falsity, proof of violation was per se proof of a lack of reasonableness). In actions arising from the suicide of a pretrial detainee, district courts in this circuit have denied motions for summary judgment where a dispute of material fact existed as to facts known to the custodial officer. *See Owens*, 6 F. Supp. 2d at 382-84 (denying qualified immunity after noting that question of fact remained as to knowledge); *Giandonato v. Montgomery County*, Civ. No. 97-0419, 1998 WL 314694, at *4 (E.D. Pa. May 22, 1998) (denying summary judgment on qualified immunity grounds where questions remained as to defendant's knowledge). Therefore, Apice is not entitled to qualified immunity at this stage because the question of whether he knew of Glenn's risk and the danger of placing Glenn's articles where he did remains a disputed issue of fact.

Because plaintiff has presented evidence permitting a finding that Glenn was particularly vulnerable to suicide and that Apice knew of Glenn's vulnerability, and because questions of fact remain as to what Apice knew, I will deny Apice's motion for summary judgment as plaintiff's claim for reckless indifference to Glenn's risk of suicide.

2. Borough of Morrisville Officer Ross Dalessio

Plaintiff has failed to point to record evidence which would demonstrate that Dalessio had knowledge of Glenn's particular vulnerability to suicide or that Dalessio had knowledge that Glenn's belt and shoes were removed to any place. Plaintiff has produced no evidence that Dalessio was in the police station until after Glenn hanged himself. Confronted with defendants' argument that no evidence supports any § 1983 claim, plaintiff was required to "set forth specific facts showing that there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e). No such evidence implicates Dalessio, and therefore summary judgment will be granted in his favor as to all claims.

3. Borough of Morrisville Lieutenant Thomas Herron

Plaintiff has failed to point to record evidence which would demonstrate that Herron had knowledge of Glenn's particular vulnerability to suicide or that Herron had knowledge that Glenn's belt and shoes were removed at all to any place. Plaintiff points to no evidence that Herron was present when Glenn was confined and questioned. Plaintiff has failed, in short, to present any evidence of Herron's personal participation in a deprivation of Glenn's constitutional rights.

Plaintiff has alleged, however, that Herron had supervisory authority over Apice. *See* Compl. ¶ 6. Although Herron can not be liable solely based on his relationship with Apice, he may be liable if he directed or approved a constitutional deprivation. *See Monell, 436 U.S. at*

691; Blanche Road Corp., 57 F.3d at 263; Baker, 56 F.3d at 1190-91. There is no evidence that Herron directed Apice to take any action with respect to Glenn's clothing. Moreover, there is no evidence that he was aware that Glenn's clothes were removed or that they were put in a place which, tragically, was within Glenn's reach.

Because plaintiff has failed to produce evidence demonstrating a genuine issue of Herron's liability for participation, direction, or approval of a constitutional violation, I will grant Herron's motion for summary judgment as to all claims.

4. Borough of Morrisville Chief Cicero

Plaintiff has failed to point to record evidence which would demonstrate that Cicero had knowledge of Glenn's particular vulnerability to suicide or that Cicero had knowledge that Glenn's belt and shoes were removed at all to any place. Plaintiff has failed to present any evidence of Cicero's personal involvement in a deprivation of Glenn's constitutional rights.

Like Herron, however, Cicero had supervisory authority over Apice. *See* Compl. ¶ 7. Consequently, he may be liable if he either directed or approved a violation of Glenn's rights. *See Monell*, 436 U.S. at 691; *Blanche Road Corp.*, 57 F.3d at 263; *Baker*, 56 F.3d at 1190-91. There is no evidence that he directed Apice to take any action with respect to Glenn's clothing. Moreover, there is no evidence that he was aware that Glenn's clothes were removed or that they were placed within Glenn's reach. Finally, there is evidence that rather than approving Apice's conduct, Cicero concluded that it was negligent, although not criminal, and recommended disciplinary sanctions. *See* Pl. 1st Resp. Ex. A at 3.

Because plaintiff has failed to demonstrate a genuine issue regarding Cicero's liability, I will grant Cicero's motion for summary judgment as to all claims.

5. Falls Township Officer DeGour

Plaintiff has failed to point to record evidence which would demonstrate that DeGour had knowledge of Glenn's particular vulnerability to suicide. Plaintiff relies on DeGour's deposition testimony that he assisted Apice in removing Glenn's handcuffs. *See* Pl. 2d Resp. at 9 (citing Pl. 2d Resp. Ex. D at 36). Plaintiff suggests that other evidence permits the inference that when he did so, he saw Glenn's hesitation marks, that DeGour knew they indicated a particular vulnerability to suicide, and that he was therefore deliberately indifferent to Glenn's particular vulnerability. *See* Pl. 2d Resp. at 9-10. The trouble for plaintiff is that there is no evidence that DeGour took any action with regard to Glenn's clothing, because plaintiff has admitted that Apice removed and relocated Glenn's belt and shoes. *See* Borough Statement ¶¶ 11 & 13 (saying that Apice removed Glenn's clothing and that Apice placed it against the wall); Twp. Statement ¶ 10 (same); Sched. Ord. of June 23, 1999 ¶ 7 (warning that moving party's stated facts will be deemed admitted for purposes of summary judgment motions if not controverted). It is because Apice removed Glenn's belt and shoes that his knowledge of Glenn's vulnerability could be inferred. No such inference is permissible as to DeGour in the absence of similar action.

Distilled, plaintiff's argument is that if DeGour saw the hesitation marks, he was deliberately indifferent to Glenn's particular vulnerability. Even assuming that DeGour did notice Glenn's hesitation marks, his failure to do more amounts only to negligence. *See Colburn*

II, 946 F.2d at 1026-27 (holding that failure to appreciate objective risk indicators was not deliberate indifference); *Freedman*, 853 F.2d at 1116 (holding that failure to appreciate import of hesitation marks was negligence at most). Nor is there any evidence in the record that DeGour was aware of the import of hesitation marks. Plaintiff has not demonstrated a genuine issue of material fact regarding DeGour's involvement in any deprivation of Glenn's constitutional rights. Therefore, I will grant DeGour's motion for summary judgment as to all claims.[10]

6. Falls Township Officer Jones

Plaintiff has failed to point to record evidence which would demonstrate that Jones played any role in the detention of Glenn or the removal of Glenn's clothing. No evidence permits the inference that Jones had knowledge of Glenn's particular vulnerability to suicide. Plaintiff's response to Jones' motion spans three pages and fails to mention Jones at all. *See* Pl. 2d Resp. at 8-10 (discussing only DeGour). Moreover, there is no evidence that Jones took any action with regard to Glenn's clothing. Plaintiff has conceded, for purposes of this motion, that Apice removed Glenn's handcuffs and clothing. *See* Borough Statement ¶¶ 11 & 13 (saying that Apice removed Glenn's clothing and that Apice placed it against the wall); Twp. Statement ¶ 10 (same); Sched. Ord. of June 23, 1999 ¶ 7 (warning that uncontroverted statements of undisputed fact will be deemed admitted for purposes of summary judgment motions). Plaintiff was

[10] Although there is evidence that DeGour knew that Glenn's clothes were removed and placed in the hallway, he cannot be said to have acquiesced in the action because he had no supervisory authority over Apice. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997) (stating that liability for acquiescence generally is inappropriate in absence of supervisory authority).

required to "set forth specific facts showing that there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e). Because plaintiff has failed to create a genuine issue of material fact regarding Jones' liability, I will grant Jones' motion for summary judgment as to all claims.

B. Count II: Liability of the Borough of Morrisville

Defendant argues that plaintiff has "failed as a matter of law to demonstrate liability under § 1983 against the Borough." *See* Borough Mot. Br. at 12. Plaintiff seeks to hold liable the Borough for failure to train its officers to detect and address the particular vulnerability of suicidal pretrial detainees. *See* Compl. ¶¶ 25 & 35.

A municipality may be liable in a § 1983 action where a municipal policy or custom causes a deprivation of federal rights. *See Monell*, 436 U.S. at 691, 694; *City of Canton*, 489 U.S. at 385; *Colburn II*, 946 F.2d at 1027. A municipality's failure to train its employees rises to the level of a custom or policy "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact" and the municipality has made a deliberate or conscious choice to fail to provide adequate training. *See City of Canton*, 489 U.S. at 388-89; *Colburn II*, 946 F.2d at 1028. The inquiry is an objective one and requires plaintiff to show that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *See City of Canton*, 489 U.S. at 390; s*ee also Owens*, 6 F. Supp. 2d at 381 (same). The Third Circuit has articulated a specific analysis to be applied in

cases of this nature. The court explained:

> In a prison suicide case, this means that the plaintiff must (1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred, and (2) must demonstrate that the risk reduction associated with the proposed training is so great and so obvious that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to a deliberate indifference to whether the detainees succeed in taking their lives.

See Colburn II, 946 F.2d at 1030.

Defendant first suggests that plaintiff fails to identify specific training which would have reduced the risk of suicide. *See* Borough Mot. Br. at 14. Plaintiff responds by noting that the Borough lacked a policy regarding removal of detainee clothing and by suggesting that if proper medical care had been given to Glenn, his vulnerability to suicide would have been identified. *See* Pl. 1st Resp. at 13-14.

The suggestion of lack of medical care is, construed most favorably to plaintiff, sufficiently specific. The suggestion fails, however, for lack of any allegation or evidence that training in providing medical care was not provided. Moreover, plaintiff's argument is contrary to the constitutional standard for provision of medical care to pre-trial detainees, which requires only that a custodial officer not be deliberately indifferent to a detainees "serious medical needs." *See Estelle v. Gamble*, 429 U.S. 97, 104 (1978); *Colburn II*, 946 F.2d at 1024. There is neither an allegation nor is there evidence that plaintiff's other reported injuries represented serious medical needs to which defendants were deliberately indifferent. Thus, it would not be a fair inference that the police were not properly trained regarding detainee medical needs, and plaintiff has presented no evidence that training in this area was deficient.

Plaintiff also argues that there was a lack of training regarding removal and relocation of

a detainee's clothing. *See* Pl. 1st Resp. at 13. There is record evidence to support such an assertion. *See id.* Identifying a problem after the fact, however, is not plaintiff's burden. Rather, plaintiff must identify "specific training" not provided and must demonstrate that failure evidences reckless indifference to an obvious risk. *See Colburn II*, 946 F.2d at 1030. First, plaintiff has not suggested specific training which could have prevented Glenn's suicide. That alone is fatal to plaintiff's claim. Second, plaintiff has failed to provide evidence that the risk reduction associated with any change in policy or training was so great and obvious that failure to adopt it may amount to reckless indifference. *See id.* In fact, there is evidence that many officers had placed prisoners' clothing in the place where Apice placed Glenn's articles. *See* Pl. 1st Resp. Ex. G at 67-69. Despite that, it is undisputed that no custodial detainee in the Borough had ever committed suicide or even attempted to do so. *See* Borough Statement ¶ 26. Consequently, there is no evidence that municipal policymakers should have been aware of the need for better or different training as an objective matter. Moreover, there is record testimony that the officers did not think clothing could be reached from the location where Glenn apparently reached it. *See* Borough Mot. Br. Ex. B at 62-63; Pl. 1st Resp. Ex. G at 67-68. Thus, there is no record evidence that as a subjective matter any policymaker was aware of the any need for different policies or training.

Because plaintiff has failed to produce evidence that an obvious risk of serious harm was ignored by the Borough, and because plaintiff did not produce evidence of specific alternatives foregone, I will grant the Borough's motion for summary judgment as to all claims.

CONCLUSION

Plaintiff brought this action against six individual police officers and the Borough of Morrisville under § 1983, seeking redress for alleged constitutional deprivations suffered by her son who hanged himself while detained in a Borough holding cell. Regarding plaintiff's claim for use of excessive force, no evidence creates a genuine issue of material fact as to any defendant. Therefore, each defendant is entitled to summary judgment on that claim.

Plaintiff's claim for deliberate indifference to Glenn's serious medical needs is better supported. Plaintiff has presented evidence sufficient to permit a reasonable jury to conclude that Apice was recklessly indifferent to Glenn's particular vulnerability to suicide. In the absence of other evidence, and in light of facts deemed admitted, however, plaintiff has failed to create a genuine issue of material fact regarding the liability of any other individual defendant for reckless indifference to Glenn's particular vulnerability to suicide. Therefore, the motion for summary judgment of Apice will be denied as to the "prisoner suicide" claim and the motions for summary judgment of Cicero, Herron, Dalessio, DeGour and Jones will be granted as to all claims.

Finally, plaintiff has failed to identify any evidence showing that a Borough policymaker was or should have been aware of an obvious risk of rights deprivation, because there had never been a suicide attempt at the Borough holding cell. Moreover, plaintiff has failed to identify any specific additional training of which the benefits should have been obvious, much less so obvious that failure to provide it may be attributed to deliberate indifference. Therefore, the motion of the Borough for summary judgment will be granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF RODNEY GLENN,, Plaintiff, v. BOROUGH OF MORRISVILLE et al., Defendants.	: : : : : : :	CIVIL ACTION NO. 99-1941

Order

And now, this day of July, 2000, upon consideration of plaintiff's amended complaint (Doc. No. 4), the concise statement of undisputed facts of the Borough of Morrisville, Wayne Apice, Ross Dalessio, Thomas Herron, and Victor Cicero (Doc. No. 18), their motion for summary judgment (Doc. No. 17), plaintiff's answer thereto (Doc. No. 30), and the reply in support of the motion for summary judgment (Doc. No. 33), as well as the motion for summary judgment of Falls Township Officers DeGour and Jones (Doc. No. 22), and plaintiff's answer thereto (Doc. No. 31) , it is hereby ORDERED that:

1. The motion for summary judgment of Wayne Apice is DENIED as to plaintiff's claim for reckless indifference to Rodney Glenn's particular vulnerability to suicide and is GRANTED as to plaintiff's claim for use of excessive force;
2. The motions for summary judgment of Ross Dalessio, Thomas Herron, Victor Cicero, Officer Jones and Officer DeGour are GRANTED as to all of plaintiff's claims in this action;
3. The motion for summary judgment of the Borough of Morrisville is GRANTED as to all of plaintiff's claims in this action; and
4. The action is DISMISSED as to all "Doe" defendants, as discovery has concluded and no amendment has been made and no additional parties have been joined.

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William H. Yohn, Jr., Judge